

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE D. GOTTLIEB and U.S. POSTAL SERVICE,
POST OFFICE, Portland, OR

*Docket No. 02-662; Submitted on the Record;
Issued July 26, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on November 26, 2001, on the grounds that his request for reconsideration was not timely filed and did not establish clear evidence of error.

On September 30, 1991 appellant then a 40-year-old mailhandler filed an occupational disease claim alleging that, on or about June 1, 1990, his elbows and left shoulder began to hurt after performing arduous physical duties including pushing and pulling dollies, hampers and other equipment. The Office accepted the claim for left shoulder tendinitis.¹

On September 27 and October 1, 1996 appellant filed CA-7 forms claiming wage-loss compensation from August 26 to September 27, 1996. Appellant alleged that no work had been made available to him during this time period due to his left shoulder injury.

By decision dated February 13, 1997, the Office denied appellant's claim for wage-loss compensation on the grounds that he failed to establish disability for work as a result of the left shoulder tendinitis.²

On November 13, 2001 appellant requested reconsideration of the February 13, 1997 decision denying wage-loss compensation.

¹ The Board notes that the Office also accepted that appellant developed left elbow tendinitis and epicondylitis while in the performance of his duties prior to June 1, 1990.

² The Board notes that, on June 20, 2001, the Office issued appellant a schedule award for 20 percent permanent loss of use of his left arm for the period September 27, 2000 to December 7, 2001.

By decision dated November 26, 2001, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits.

The only decision before the Board in this appeal is the November 26, 2001 decision, in which the Office denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. Since more than one year has elapsed between the date of the Office's merit decision dated February 13, 1997 and the filing of appellant's appeal on February 5, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.³

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁷ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁸

Appellant requested reconsideration on November 13, 2001. Since appellant filed his reconsideration request more than one year from the Office's February 13, 1997 merit decision, the Board finds that the Office properly determined that said request was untimely.

In those cases where requests for reconsideration are not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁹ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.¹⁰

³ 20 C.F.R. § 501.3(d)(2).

⁴ 5 U.S.C. § 8128(a).

⁵ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁶ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁷ 20 C.F.R. § 10.607. The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁸ *Thankamma Mathews*, *supra* note 5 at 769; *Jesus D. Sanchez*, *supra* note 6 at 967.

⁹ *Thankamma Mathews*, *supra* note 5 at 770.

¹⁰ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁵ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.¹⁶ The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁷

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as the correctness of the most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. Appellant submitted argument with his reconsideration request that he has left shoulder tendinitis accepted as causally related to work factors for which he has suffered a permanent disability. Appellant argued that, following his injury, the employing establishment sent him home claiming that no light-duty work was available for him and therefore he suffered wage loss. Appellant asserted that all of the medical evidence needed to establish his disability was of record at the time the February 13, 1997 decision was rendered and that the evidence should be reviewed at this time.

The Board notes however that the evidence of record establishes that appellant resigned from the employing establishment. The evidence does not establish that appropriate work was not made available to him.

As appellant has failed to establish clear evidence of error on the part of the Office, the Office properly denied appellant's request for reconsideration.

¹¹ *Thankamma Mathews*, *supra* note 5 at 770.

¹² *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ *Jesus D. Sanchez*, *supra* note 6 at 968.

¹⁴ *Leona N. Travis*, *supra* note 12.

¹⁵ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁷ *Gregory Griffin*, *supra* note 7.

The November 26, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 26, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member